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No. 80-195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

METROMEDIA, INC.,

Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation, AND DOES I THROUGH XX, INCLUSIVE,

Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.

Appellant,

v.

THE CITY OF SAN DIEGO, A MUNICIPAL CORPORATION, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, ZONING ADMINISTRATOR OF THE CITY OF SAN DIEGO AND DOES 1 THROUGH 10, INCLUSIVE,

Appellees,

On Appeal From The Supreme Court of California

BRIEF AMICUS CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION IN SUPPORT OF APPELLANTS

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PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") submits this brief amicus curiae in support of Appellants Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc. All parties to this suit have given ANPA written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS

ANPA is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,410 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States.

While ANPA is principally concerned with issues of general significance to the profession of journalism and the newspaper publishing business, and has frequently presented its views to this Court as an *amicus curiae* in cases touching on those concerns, ANPA and its members are ever vigilant to ensure that the free speech and free press guarantees of the First Amendment are not abridged.

The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ," *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945), and "the best means to that end is to open the channels of communication, rather than to close them . . ." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 770 (1976).

It should be noted that there is no allegation in this case that the commercial speech sought to be eliminated is misleading, false, related to unlawful activity, or otherwise subject to regulation as delineated in *Central Hudson Gas & Electric Co.* v. *Public Service Comm'n.,* —U.S.—, 65 L.Ed 2d 341 (1980). Contrawise, this is the very type of commercial speech which the court has recognized as subject to First Amendment protection in *Virginia State Board of Pharmacy, supra, First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978) and *Bigelow* v. *Virginia,* 421 U.S. 809 (1975). ANPA is firmly committed to the proposition that the First Amendment not only affirmatively requires protection for a "multitude of voices" but also prohibits the government from completely suppressing any particular medium through which information and ideas may be communicated.

The city ordinance in the instant case absolutely bans all off-site outdoor advertising and, if permitted to stand, will result in the complete elimination of a means of communication and media for the expression of ideas. Because your *amicus* believes that the First Amendment prohibits the elimination of any particular medium of expression, ANPA desires to briefly present to the Court, for its assistance, its views on the significant issues raised by appellants herein.

QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENT OF THE CASE

ANPA adopts the questions presented, constitutional provisions involved and statement of the case, all as set forth in the appellants' brief.

ARGUMENT

THE FIRST AMENDMENT GUARANTEES TO THE PUBLIC THE RIGHT TO RECEIVE INFORMATION AND, CONCOMITANTLY, PROHIBITS THE GOVERNMENT FROM BANNING A MEDIUM OF COMMUNICATION.

This Court frequently has held that the First Amendment not only guarantees the freedom to speak and to publish but also the freedom of the public to receive informational ideas. See *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748 (1976); *Stanley* v. *Georgia,* 394 U.S. 557 (1969); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). The First Amendment freedoms of speech and press act as an essential protection against arbitrary and oppressive exercise of the powers delegated to our federal and state governments, but the right of the public to speak and the press to publish is unfulfilled without a correlative public right to receive information. See, Emerson, *Legal Foundations of the Right to Know,* 1976 WASH. U.L.Q., 6-7 (1976); Note, *The Constitutional Right to Know,* 4 HASTING CONST. L.Q. 109 (1977). This Court has recognized this

right on several occasions. In *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85 (1977), this Court struck down a city ordinance prohibiting the posting of real estate "For Sale" or "Sold" signs, based on both the speaker's right to communicate and the listener's "First Amendment interest in the subject matter of the speech." *Id.* at 92. *See also Virginia Pharmacy Bd.* v. *Virginia Consumer Council,* 425 U.S. 748 (1976). The case of *Procunier* v. *Martinez,* 416 U.S. 396 (1974) recognized a right to receive personal correspondence. This Court further has held that both "a labor organizer's right to speak and the right of workers 'to hear what he had to say,' . . . were abridged by a state law requiring organizers to register before soliciting union membership." *Kleindienst* v. *Mandel,* 408 U.S. 753 at 763 (1972), citing *Thomas* v. *Collins,* 323 U.S. 516 (1945).

In *Stanley* v. *Georgia,* 394 U.S. 557 (1969), this Court noted that "[It] is now well established that the Constitution protects the right to receive informational ideas . . . This right to receive informational ideas . . . is fundamental to our free society." *Id.* at 564. And in *Griswold* v. *Connecticut,* 381 U.S. 479, 482 (1965), the Court referred to a right to receive information as falling within the penumbra of the First Amendment freedoms of speech and press.

The acknowledged right to receive information is of no value if the government has the power to eliminate the means of conveying such information. Whether the San Diego ordinance, at issue herein, is viewed as an abridgement of freedom of the press ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin,* 202 U.S. 444, 452 (1938)), or as an abridgement of freedom of speech ("The primary concern of the free speech guarantee is that there be full opportunity for expression in all of its varied forms to convey a desired message." *Young* v. *American Mini Theatres,* 427 U.S. 50, 76 (1976) (Powell, J. concurring)), it is clear that, by attempting to eliminate all off-site outdoor advertising, the

ordinance violates the First Amendment. The parties have stipulated that there are no adequate alternative means of serving the "many businesses and politicians and other persons" whose needs are served only by outdoor advertising, yet this Court has expressed grave concern as to the constitutionality of less restrictive ordinances which failed to "leave open ample alternative channels for communication." *Virginia Pharmacy Board, supra* at 771.

> Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated—primarily newspaper advertising and listing with real estate agents—involve more cost and less autonomy than "For Sale" signs; cf. *Martin* v. *City of Struthers,* 319 U.S. 141, 146, 87 L.Ed. 1313, 63 S.Ct. 862 (1943); *Kovacs* v. *Cooper, supra,* at 102-103, 93 L.Ed. 513, 69 S. Ct. 448, 10 ALR2d 608 (Black, J., dissenting); are less likely to reach persons not deliberately seeking sales information, cf. *United States* v. *O'Brien,* 391 U.S. 367, 388-389, 20 L.Ed. 2d 672, 88 S.Ct. 1673 (1968) (Harlan, J., concurring); and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold, cf. *Cohen* v. *California,* 403 U.S. 15, 25-26, 29 L.Ed 2d 284, 91 S.Ct 1780 (1971).

Linmark Associates, Inc. v. *Township of Willingboro,* 431 U.S. 85, 93 (1977).

No less than the "For Sale" signs in *Linmark Associates, supra,* the handbills in *Jamison* v. *Texas,* 318 U.S. 413 (1943), door-to-door solicitation as in *Martin* v. *City of Struthers,* 319 U.S. 141 (1943) or leaflets as in *Lovell* v. *City of Griffin,* 303 U.S. 444 (1938), the off-site outdoor advertising at issue in the instant case is entitled to First Amendment protection. This is especially so since, as stipulated, outdoor advertising in San

Diego contains "valuable commercial, political and social information." In recent years, this Court has recognized that commercial speech is protected by the First Amendment for "[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas & Electric Co.* v. *Public Service Comm'n.*, — U.S. —, 65 L.Ed 2d 431, 348 (1980); see also *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

While, in varying contexts, this Court has established criteria whereby protected expression could be limited, see *e.g.*, *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (zoning restrictions on locations of adult movie theatres); *Grayned* v. *Rockford*, 408 U.S. 104 (1972) (antinoise regulation prohibiting demonstrations that would disturb the good order of an educational facility), the Court has never upheld a law which absolutely prohibited the usage of a particular medium of communication. In *Jamison* v. *Texas*, 318 U.S. 413 (1943), the Court invalidated an ordinance which prohibited the distribution of handbills at all places, at all times, and under all circumstances. And in *Schneider* v. *State*, 208 U.S. 147 (1939) the Court refused to uphold a similar ordinance despite the State's argument that the restriction only applied to public streets and sidewalks.

A review of this Court's decisions in the First Amendment area demonstrates that, on numerous occasions, regulations which are based on the content of speech have been invalidated. *Consolidated Edison Co.* v. *Public Service Comm'n.*, — U.S. — 65, L.Ed 2d 319 (1980) (order barring utilities from including inserts discussing controversial public policy issues in billing envelopes); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975) (prohibition of the exhibition of films containing nudity at drive-in theaters having screens visible from a public place); *Police Department* v. *Mosley*, 408 U.S. 92 (1972) (ordinance prohibiting picketing near schools except peaceful

picketing of any school involved in labor dispute). Similarly, the Court has not hesitated to hold unconstitutional regulations whereby protected expression may be exercised only if a permit or license is obtained. *Hynes* v. *Mayor of Oradell,* 425 U.S. 610 (1976) (ordinance requiring an identification permit for canvassing or soliciting for charitable or political purposes); *Saia* v. *New York,* 334 U.S. 558 (1948) (permit required for operation of a sound truck); *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496 (1939) (permit required for holding designated public meetings).

Although regulations which restrict the exercise of protected expression may be upheld where they are precisely tailored to satisfy a significant state interest, the least restrictive means of regulation are utilized, and there are ample alternative means available for expression of the regulated communication, see *Central Hudson Gas, supra* at 349-350; *Consolidated Edison, supra* at 332 n.2 (Stevens, J. concurring), in none of those cases was a complete ban on a given medium of communication upheld.

The argument that the San Diego ordinance is merely a time, place and manner restriction cannot be sustained where the restriction is so broad that it eliminates an entire form of expression and, thereby, denies to certain speakers the opportunity to communicate their message. *Murdock* v. *Pennsylvania,* 319 U.S. 105, 112 (1943) ("Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation."). No better statement of the reasons for invalidating the San Diego ordinance can be made than the words of Justice Black, dissenting in *Kovacs* v. *Cooper,* 336 U.S. 77 (1949). Although the plurality in that case upheld the appellant's conviction, it did so on the basis that he was convicted of operating a sound truck that emitted "loud and raucous noises." Justice Black believed that, under the facts of the case, the appellant was convicted merely for the act of operating a

sound truck and eloquently explained the invalidity of any regulation which banned the use of a form of communication:

> The New Jersey ordinance is on its face, and as construed and applied in this case by that state's courts, an absolute and unqualified prohibition of amplifying devices on any of Trenton's streets at any time, at any place, for any purpose, and without regard to how noisy they may be.
>
> * * * *
>
> In this case the Court denies speech amplifiers the constitutional shelter recognized by our decisions and holding in the Saia Case. This is true because the Trenton, New Jersey, ordinance here sustained goes beyond a mere prior censorship of all loud speakers with authority in the censor to prohibit some of them. This Trenton ordinance wholly bars the use of all loud speakers mounted upon any vehicle in any of the city's public streets.
>
> In my view this repudiation of the prior Saia opinion makes a dangerous and unjustifiable breach in the constitutional barriers designed to insure freedom of expression. Ideas and beliefs are today chiefly disseminated to the masses of people through the press, radio, moving pictures, and public address systems. To some extent at least there is competition of ideas between and within these groups. The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition. Laws which hamper the free use of some instruments of communication thereby favor competing channels. Thus, unless constitutionally prohibited, laws like this Trenton ordinance can give an overpowering influence to views of owners of legally favored instruments of communication. This favoritism, it

seems to me, is the inevitable result of today's decision. For the result of today's opinion in upholding this statutory prohibition of amplifiers would surely not be reached by this Court if such channels of communication as the press, radio, or moving pictures were similarly attacked.

There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places. Yet everybody knows the vast reaches of these powerful channels of communication which from the very nature of our economic system must be under the control and guidance of comparatively few people. On the other hand, public speaking is done by many men of divergent minds with no centralized control over the ideas they entertain so as to limit the causes they espouse. It is no reflection on the value of preserving freedom for dissemination of the ideas of publishers of newspapers, magazines, and other literature, to believe that transmission of ideas through public speaking is also essential to the sound thinking of a fully informed citizenry.

* * * *

There is no more reason that I can see for wholly prohibiting one useful instrument of communication than another. If Trenton can completely bar the streets to the advantageous use of loud speakers, all cities can do the same. In that event preference in the dissemination of ideas is given those who can obtain the support of newspapers, etc., or those who have money enough to buy advertising from newspapers, radios, or moving pictures. This Court should no more permit this invidious prohibition against the dissemination of ideas by speaking than it would permit a complete blackout of the press, the radio, or

> moving pictures. It is wise for all who cherish freedom of expression to reflect upon the plain fact that a holding that the audiences of public speakers can be constitutionally prohibited is not unrelated to a like prohibition in other fields. And the right to freedom of expression should be protected from absolute censorship for persons without, as for persons with, wealth and power. At least, such is the theory of our society.

Kovacs v. *Cooper, supra* at 101-04 (Black, J. dissenting).

CONCLUSION

ANPA believes that Justice Black's reasoning and explanation of the First Amendment's guarantees are fully applicable to the case at bar. The First Amendment does not permit the government to pick and choose among forms of expression. If it did, then one of the primary purposes of that Amendment—to prevent the government from controlling that information which is available to the citizenry—would be eviscerated. For that reason the San Diego ordinance must be invalidated and the decision of the Supreme Court of California must be reversed.

Respectfully submitted,

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